Osborne Clarke is one of Europe's most respected law firms, and advises market-leading and high-performing organizations on their UK and international legal needs. Any enquiries regarding this column should be sent by email to Stephen Groom (stephen.groom@osborneclarke.com)

Legal and Regulatory Update

OFT demands transparency on paid for promotions

Tom Harding

Journal of Direct, Data and Digital Marketing Practice (2011) **13**, 67–69.
doi:10.1057/dddmp.2011.21

Who: Twitter and the Office of Fair Trading

Where: UK

When: February 2011

Law stated as at: February 2011

What happened? OFT statement shows hard line

The OFT released a statement in January this year stating that ‘online advertising and marketing practices that do not disclose that they include paid-for promotions are deceptive under fair trading laws ... This includes comments about services and products on website blogs and microblogs such as Twitter. We expect online advertising and marketing campaigns to be transparent so consumers can clearly tell when blogs, posts and microblogs have been published in return for payment or payment in kind’. Although this is, therefore, a clear policy statement from OFT, it has not driven any recent change in regulation. The impetus therefore seems more likely to be driven by an increased policy-led desire to enforce a regime that already exists.

CPR Regulations (CPRs) clear on misleading marketing

The prohibition on misleading marketing under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) has long been clear; under Regulation 3(4)(b) of the CPRs, ‘misleading omissions’ constitute unfair commercial practices (and are therefore in breach of the CPRs and carry penalties). Failing to disclose that a promotion had been paid for (or is otherwise remunerated) would typically therefore constitute a ‘misleading omission’, and would also most likely be deemed an ‘unfair commercial practice’ under Paragraph 11 of Schedule 2 (namely, where a trader uses ‘editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)’).

Handpicked Media enforcement demonstrates tough approach

As the CPRs have not been amended since they were introduced, the regulation of paid-for promotions, whether on Twitter or otherwise, has not itself changed. The more pressing issue that marketers now face, however, is that OFT’s enforcement of the CPRs in the context of Twitter (and other online contexts) is now firmly in its policy agenda.

Part of the backdrop to this area was the OFT's case against Handpicked Media (HM), late last year, which sent out a loud and clear message that its enforcement action in this area had teeth. HM operates a commercial blogging network. As part of its services to clients, HM engaged bloggers to provide editorial coverage of various topics including fashion, beauty and music. The coverage inevitably included favourable references to HM's clients or their products, and was published on various sites and blogs including, via Twitter. The OFT was concerned that the individuals engaged by HM were publishing online content, which promoted the activities of HM's clients without making it sufficiently clear to consumers that the promotions had been paid for. It subsequently found that HM was in breach of the CPRs in doing so, and required HM to give formal undertakings that it would discontinue the practice.

This was the OFT's first enforcement action in this sphere, but seemingly may only be the start if breaches are found.

The US Picture

Transparency is central to CPRs

The question for UK brands, marketers and bloggers, therefore, is what they should do (or ensure is done) in relevant Tweets, blogs etc to stay within the CPRs and out of the OFT's range. The key is transparency, which in effect goes to the heart of the rationale of the CPRs themselves.

'Ad/spon' disclosures identify US endorsements

In the US, such transparency has been achieved by the use of 'ad/spon' short form disclosures at the start of Tweets, blogs etc. These disclosures have been driven by updated Federal Trade Commission (FTC) guidelines to existing legislation (the 'Guides Concerning the Use of Endorsements and Testimonials in Advertising'). In effect, these guidelines specify that while enforcement decisions will be reached on a case by case basis, a posting by a blogger who receives cash or in-kind payment to review a product is considered an endorsement. Where endorsements are made, the blogger must disclose the 'material connections' they share with the seller of the relevant product or service.

Celebrities must disclose advertiser relationships in US

The FTC guidelines also expressly reference the role of celebrity endorsers of products and services. Here, the FTC state that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional advertisements, such as in social media.

The effect of this has been extremely successful in compliance terms; 'paid for' or influenced blogs and Tweets in the US are now typically highlighted by the 'ad/spon' disclosure as a matter of course. In addition to this, there has also been the emergence of specialist software (such as www.cmp.ly), which can track paid-for online endorsements and add clarifying disclosures whenever it finds them in order to ensure compliance.

Will the UK follow?

UK likely to follow US

So, will the OFT's stance ultimately lead to similar practices in the UK? In short, the answer would seem to be yes.

The US is to date far more advanced in the detail to which regulators have applied themselves to this area. This is most probably driven by the larger US economy associated with these types of endorsements (with the most often cited example being that Snoop Dogg reputedly earns around US\$3,000 a Tweet), but nonetheless demonstrates where the UK may be likely to head in regulatory compliance terms as its own similar industry develops.

And this seems likely as, as the OFT set out its statement, the common driver behind both UK and US regulation is transparency. Although the FTC Act and CPRs differ on a technical level, the rationale of consumer fairness underpins them both. It therefore seems reasonable to assume the practical compliance outcomes will therefore be similar, and 'ad/spon' disclosures may become commonplace in the UK.

Should Free products also be disclosed?

An interesting related issue is whether UK bloggers and consumers given free products by brands in the hope that they will try to review them should be required to disclose this. In the US, FTC guidance recommends that brands issuing free products in this way should require recipients to make this clear in any reviews and public comments and should operate an adequate compliance monitoring programme. This is probably also a prudent approach for UK businesses to follow to avoid allegations of offences under the CPRs.

Further issues to consider also include to what extent consumer testimonials and endorsements incentivised by the chance to enter prize draws and contests should only be used by brands when accompanied with appropriate caveats, for example. However, these and other compliance issues will no doubt play out over time.

*Tom Harding, Solicitor,
Osborne Clarke
E-mail: tom.harding@osborneclarke.com*

Northern Ireland prize draw rules may be brought into line with rest of UK

Stephen Groom

Journal of Direct, Data and Digital Marketing Practice (2011) **13**, 69–71.
doi:10.1057/dddmp.2011.22

Topic: Promotion marketing

Who: The Department for Social Development

Where: Northern Ireland

When: Consultation closes 31 May 2012

Law stated as at: 1 April 2011

Northern Ireland catches up on prize draws ...

What happened

Six years on from 'purchase to enter' prize draws becoming legal in Great Britain (GB) under the Gambling Act 2005 (GA), Northern Ireland (NI) is finally consulting on whether to bring the province's gambling and lottery laws into line with those of the mainland.

Since the coming into force of the GA, promotional prize draws which require a purchase before entering have not breached GB lottery/gambling laws provided the price or rate payable for the purchase does not 'reflect the opportunity to participate in (the promotion)' (Para 2 (c) of Schedule 2 to the GA).

In other words, provided the price or rate payable is normal and has not been artificially inflated to help cover the additional costs of running the promotion, having to make a purchase in order to enter the draw is perfectly legal in GB.

In NI, however, it is the old, unreconstructed lottery laws that still hold sway. This means that unless it comes within limited private society/good cause exemptions, running a purchase to enter prize draw will be a criminal offence as a lottery.

So it came to pass that 'Legal residents of NI may not enter' became common in prize draw rules. Also popular for those determined to be inclusive have been special alternative free entry routes for NI residents. Care is needed here, as it is clear from the writer's experience that certain eagle eyed Ulstermen have been keeping a weather eye on promotions of this type and swooping to take advantage of promotion rules if they see a chance of cashing in.

GB/NI prize competition laws also differ

Another point of GB/NI difference relates to prize competitions.

GB now allows these provided either:

- no payment is required to participate or
- the level of skill required to win passes a new 'deterrent' test.

In contrast, NI still applies the 'success must depend to a substantial degree on the exercise of skill' test previously applied in GB. This means that any competition will be illegal (regardless of whether it is pay to enter) if the degree of skill required to win does not meet that test.

Now at last, there looks to be at least a chance that all this will soon be history.

The NI Department for Social Development has published a consultation document titled 'Future Regulation of Gambling in Northern Ireland'.

With a deadline for responses of 31 May 2012, the consultation asks for views on whether there might be a change in NI law 'to enable people in NI to participate in prize competitions and free draws on the same basis as those in the rest of the UK'.

The 'free draws' reference is odd because the principal type of prize draw which would be affected by any alignment of NI law with that of

... and also competitions

Consultation published

GB would not be 'free draws' but 'purchase to enter' draws. However, the consultation document does seem to have a full alignment with GB law in this area in its sights. It says:

'In GB, prize competitions and genuine free draws are free from control under the 2005 Act. They can be run for commercial or private gain and can be used as a fun way of offering prizes or promoting a product'.

Why this matters: This is definitely a case of 'better late than never' for UK marketers and their legal advisers, and it will certainly be sighs of relief all round if and when the changes vaunted by this initiative are made. It remains to be seen, however, whether there are still forces at work in the province which will persuade the authorities that the *status quo* is to be preferred.

*Stephen Groom, Head of Marketing and Privacy Law,
Osborne Clarke*
E-mail: stephen.groom@osborneclarke.com